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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EMILY JONES LARSEN et al., Plaintiffs and Appellants, v. NISSAN NORTH AMERICA, INC., et al., Defendants and Respondents.	A121838 (Contra Costa County Super. Ct. No. C06-01847)

Plaintiff Vincent W. Jones purchased a car manufactured by defendant Nissan North America, Inc. After four years of use, one of the car's ignition coils required replacement. The next year, the remaining coils were replaced. Because the "new vehicle" warranty had expired after 36 months, the replacement costs were not covered. Jones and his daughter, plaintiff Emily Jones Larsen, to whom he had transferred the car, sued various corporations involved in the car's manufacture and sale, alleging the coils were defective and seeking the replacement cost of the car as well as the repair costs. The trial court granted judgment on the pleadings, concluding that the failure of the coils was not covered by the express warranty and was not otherwise actionable. We affirm.

I. BACKGROUND

Plaintiffs are father and daughter. Defendants are corporations involved in the manufacture and sale of Nissan vehicles. The complaint alleges that, in July 2000, Jones purchased a new Nissan Maxima car, which he later gave to Larsen. After four years of operation, in August 2004, one of the car's ignition coils required replacement; at the time, the odometer read 59,100 miles. Almost a year later, on July 18, 2005, the

remaining five coils were replaced.[1] By that time, the complaint alleged, Jones had learned "that the original six coils on the automobile were defective and that Nissan North America, Inc., had issued a Technical Service Bulletin . . . recommending that all six ignition coils on the automobile be replaced with superceding [*sic*] defect-free ignition coils." The complaint alleged that defendants "knew or should have known [at the time the car was sold] that the ignition coils in the automobile . . . were defective." The complaint does not describe the nature of the alleged defect in the coils. Because there is no allegation the car performed unsatisfactorily prior to the coils' failure, we presume the defect is their limited service life.

Plaintiffs attached to the complaint a copy of the referenced Technical Service Bulletin, which was issued in 2001. Contrary to the characterization in the complaint, the service bulletin does not recommend replacement of the ignition coils, at least not in cars otherwise functioning normally.[2] Rather, the bulletin states that if a vehicle exhibits one or both of two symptoms, "MIL 'ON' with DTC P1320 stored in the ECM" and "Intermittent spark knock (detonation)," the cause might be failure of "one or more of the ignition coils." It then provides a method for determining whether the coils are the source of the diagnostic symptoms and, if so, dictates their replacement.

A copy of the booklet describing the manufacturer's express warranties was also attached to the complaint. The Maxima was subject to a "new vehicle limited warranty" that covered "any repairs needed to correct defects in materials or workmanship of all parts and components," for 36 months or 36,000 miles, whichever occurred first. In addition, the vehicle was covered by a "powertrain" warranty running for 60 months or

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[1] The function of an ignition coil is to convert the low voltage from the vehicle's battery into the high voltage required for firing of the spark plugs. Most modern engines have an individual coil for each engine cylinder, which apparently was the case with plaintiffs' Maxima. Failure of an ignition coil would cause the associated cylinder not to fire, causing the engine to run roughly.

[2] When a complaint attaches documents, the documents are treated as part of the complaint. Any conflict between the allegations of the complaint and the content of the exhibits is resolved in favor of the exhibits. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

60,000 miles that applied to certain specified components. While several engine parts are listed as covered by the powertrain warranty, the ignition coils are not among them. The booklet also included "federal vehicle emission control limited warranties," which cover "any repairs needed to correct defects in materials or workmanship which would cause your vehicle not to meet [applicable United States emission] standards." This warranty covers a series of parts, including the ignition coils, for 36 months or 36,000 miles; a few parts are covered for eight years or 80,000 miles, but the ignition coils are not among them. The warranty also covers any emissions test failure within the first 24 months or 24,000 miles. Finally, the car was subject to "California vehicle emission control warranties" that require replacement of any defective parts during the first three years or 50,000 miles, whichever occurs first. A longer seven-year/70,000-mile warranty covers certain specified parts, but again ignition coils are not among them. Because the car was four years old and well past 50,000 miles by the time the first ignition coil failed, it is clear from the face of the complaint that none of the express warranties covered the failure. A highlighted box in the booklet states: "ANY IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE SHALL BE LIMITED TO THE DURATION OF THIS WRITTEN WARRANTY."

The complaint alleged seven causes of action. The first, for violation of the Song-Beverly Consumer Warranty Act (Civ. Code, §§ 1972–1795.8), alleged that the car was sold in violation of "the implied warranties contained in the Song-Beverly Consumer Warranty Act" as a result of the defective condition of the ignition coils. The second cause of action, for misrepresentation, alleged that two of the defendants falsely represented in writing that the Maxima had "one of the 10 best and most reliable automobile engines in the world," "required no scheduled coil maintenance for at least 105,000 miles," and had a " 'trouble-free' " ignition system. The third cause of action, for breach of express warranty, alleged that the manufacturer's 60-month/60,000-mile express powertrain warranty covered coil failure and that the car was delivered for repair prior to expiration of that warranty. The fourth cause of action alleged a violation of the warranty of merchantability because the car did not meet California and federal emission

control standards for the required period of time. The fifth cause of action alleged that Larsen had been overcharged for repair work; the sixth cause of action alleged a violation of the Lemon Law (Civ. Code, §§ 1793, 1793.2); and the seventh cause of action claimed that defendants refused to engage in alternative dispute resolution. As damages, the complaint sought the replacement value of the car when new, reimbursement of repair costs, civil penalties, and attorney fees.

In November 2007, defendants moved for judgment on the pleadings. The motion argued, in very general terms, that the express warranty covering the ignition system of the Maxima ran for only the first 36 months or 36,000 miles, whichever occurred first, and that plaintiffs' various theories of recovery could not avoid the limitations of this express warranty. In its tentative ruling, the trial court concluded that "[t]he express warranties . . . do not cover the replacement of the ignition coils, which occurred after the warranty period elapsed. A latent defect, discovered outside the limits of a written warranty, may not form the basis for a valid express warranty claim even if the warrantor knew of the defect at the time of sale. [Citation.] Additionally, both parties agree that the implied warranties are contemporaneous with the express warranties." The motion was granted without leave to amend.

Following the grant, plaintiffs filed a motion for reconsideration that attached a proposed amended complaint. The motion argued that plaintiffs had discovered additional evidence in the course of discovery, some of which occurred after filing of the motion for judgment on the pleadings, that justified amendment of the complaint to avoid defendants' objections. The motion to reconsider was denied on the ground that plaintiffs "fail[ed] to comply with requirements of [Code of Civil Procedure section] 1008."

II. DISCUSSION

On appeal, plaintiffs do not defend most of their causes of action. They do not, for example, argue that the coils' failure was covered by the car's express warranties. Rather, they raise only two arguments, contending first that the trial court erred in denying their motion for reconsideration because the proposed amended complaint contained facts sufficient to state a cause of action under the California Consumer Legal

Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). Second, plaintiffs argue they adequately stated a claim for breach of the implied warranty of merchantability.

" 'A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]' [Citation.] Further, the court reviews the complaint liberally, giving it a reasonable interpretation, reading it as a whole and its parts in their context." (*Los Angeles Unified School Dist. v. Great American Ins. Co.* (2008) 163 Cal.App.4th 944, 959.) An appellate court must reverse the grant of a demurrer without leave to amend if "there is a reasonable possibility that the defect [in the complaint] can be cured by amendment." (*City of Dinuba v. County of Tulane* (2007) 41 Cal.4th 859, 865.)

A. *CLRA Claim*

The proposed amended complaint includes new allegations of several written and oral representations made by defendants or their representatives. We do not reach the propriety of the trial court's denial of leave to amend on procedural grounds because we find the allegations of the proposed amended complaint insufficient to state a claim.

As the parties acknowledge, the leading case is *Daugherty v. American Honda Motor Co. Inc.* (2006) 144 Cal.App.4th 824 (*Daugherty*), in which the court affirmed the grant of a demurrer with respect to a class action complaint that, like this one, "alleg[ed] an automobile manufacturer breached its express warranties and violated federal and state consumer protection laws, by failing to disclose an engine defect that did not cause malfunctions in the automobiles until long after the warranty expired." (*Id.* at p. 827.) In *Daugherty*, the vehicle engine was alleged to have a defect that caused eventual oil loss and engine damage. (*Ibid.*) Several of the named plaintiffs' vehicles had not experienced the problem, and those that had did not begin to malfunction until well after the covered period in the express warranty. (*Id.* at pp. 828–829, 830.)

Regarding the CLRA, *Daugherty* explained that the statute "proscribes specified 'unfair methods of competition and unfair or deceptive acts or practices' in transactions for the sale or lease of goods to consumers.[3] (Civ. Code, § 1770, subd. (a).) The unlawful acts or practices include: [¶]—'Representing that goods . . . have . . . characteristics . . . which they do not have . . . .' (Civ. Code, § 1770, subd. (a)(5)); and [¶]—'Representing that goods . . . are of a particular standard, quality, or grade, . . . if they are of another.' (Civ. Code, § 1770, subd. (a)(7).)" (*Daugherty, supra*, 144 Cal.App.4th at p. 833.) The *Daugherty* plaintiffs contended that the manufacturer violated the CLRA by failing to disclose the potential oil loss, despite its knowledge of the problem, and continuing to sell cars with the defect. The court rejected the claim, reasoning that "[t]he complaint fails to identify any representation by Honda that its automobiles had any characteristic they do not have, or are of a standard or quality they are not. All of plaintiffs' automobiles functioned as represented throughout their warranty periods, and indeed many still have experienced no malfunction." (*Daugherty*, at p. 834.)

The *Daugherty* court rejected the plaintiffs' reliance on *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30 (*Outboard Marine*), which suggested that a CLRA claim is stated when a vehicle fails to satisfy specific and objective performance criteria advertised by the manufacturer. (*Outboard Marine,* at p. 37.) While not disagreeing with the reasoning of *Outboard Marine*, *Daugherty* concluded that "although a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose. In [the plaintiffs'] case, no representation is alleged relating to the . . . engine, which functioned

[3] *Daugherty* also addressed the scope of warranty coverage, an issue plaintiffs do not raise on appeal. The court noted the general rule that an express warranty does not cover repairs made after the time or mileage established by the warranty and rejected the suggestion that such warranties also cover a latent defect that emerged after expiration of the warranty period. (*Daugherty, supra,* 144 Cal.App.4th at p. 830.)

as warranted." (*Daugherty*, *supra*, 144 Cal.App.4th at p. 835.) A similar conclusion was reached in *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, in which the court found no violation of the CLRA merely because the defendant failed to disclose that it had used inferior materials in the manufacture of a vehicle component, when the defendant had made no express representations about the quality of the component. (*Bardin*, at p. 1276.)

Plaintiffs do not identify a statute or rule of law requiring defendants to disclose the expected service life of the Maxima's ignition coils, even if that service life was so short as to constitute a defect.[4] The issue, then, is whether defendants' failure to disclose the defectively short service life of the ignition coils was "contrary to a representation actually made by the defendant" (*Daugherty*, *supra*, 144 Cal.App.4th at p. 835)—in other words, whether defendants expressly or implicitly misrepresented the coils' service life.

Remarkably, the section of plaintiffs' opening brief addressing this issue does not discuss any particular alleged misrepresentation among the dozen or more in the proposed amended complaint. The brief merely states generally that "the additional facts alleged in the Proposed Verified First Amended and Supplemental Complaint allege representations of fact and omissions by Nissan Defendant that 'work[] a concealment of the true fact[s],' for the purpose of inducing Plaintiffs to purchase the Nissan Vehicle, and such allegations fall squarely within the holdings of *Daugherty* and *Outboard Marine.*" Our independent review of the allegations in the proposed amended complaint found no such qualifying allegations. The first set of alleged misrepresentations is found

[4] In their reply brief, plaintiffs argue for the first time that they alleged "a safety risk and dangerous condition due to the defective ignition coils . . . which trigger a duty of disclosure under the CLRA." "Generally, a contention may not be raised for the first time in the reply brief." (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) In any event, the contention is without merit. Plaintiffs do not identify the provision of the CLRA that creates this purported duty to disclose safety hazards, and our review of the CLRA failed to locate it. Further, their allegation of a safety hazard amounts to nothing more than the conclusory allegation that the car "could not be dependably and safely driven" when the coils were beginning to fail, not that the defect created a specific threat of physical injury.

in paragraph 32, and includes such claims as Maxima vehicles undergo extensive testing to ensure high quality and durability, the Maxima's ignition system was a key strength of the vehicle, the 2000 Maxima had improved quality control and engineering, the engine is one of the 10 "best and most reliable" in the world, and the ignition is " 'trouble-free' " and has "longer life with less service" than other ignition systems. Without discussing each alleged misrepresentation individually, all are too general to support a claim under *Daugherty* and *Outboard Marine.* None of them even mentions the ignition coils, let alone represents that the coils have a usable life longer than four years. Further, precisely because they are so general, these representations about overall quality are not made false merely because one ignition component has a tendency to fail prematurely.[5]

The representations alleged in paragraphs 33 and 47 of the proposed amended complaint are of the same type—for example, that the reliability of the 2000 model Maxima was superior to the 1999 model, that Jones, as the purchaser, could rely on the long-term quality and reliability of the car, that the Maxima has a "most reliable engine," and that purchasers "can rely on the long-term quality and reliability of 2000 Nissan Maximas." None of them addresses ignition coils with sufficient specificity to constitute an actionable omission or misrepresentation under *Daugherty* and *Outboard Marine.*

In their reply brief, plaintiffs do identify three specific misrepresentations, both oral and written, they contend are actionable: "[t]hat Plaintiffs could rely on the long-term quality and reliability of the 2000 Nissan Maxima; that the powertrain warranty would apply to the problem Plaintiffs had with their previous 1999 Maxima, which included problems starting [*sic*]; that the only exclusions from the basic express warranties were damages or failures resulting from accidents, misuse of the vehicle or improper repair or alterations." The first of these is the type of general statement that

[5] Some are not even misrepresentations. As one example, plaintiffs allege that the owner's manual, attached to the complaint, does not require scheduled maintenance for the ignition coils over the first 105,000 miles of travel. That does not constitute a representation about the service life of the coils; rather, it demonstrates that coils are not the type of component that requires regular maintenance.

implies nothing about the durability of individual engine components. The second and third alleged misrepresentations do not concern the quality of the car but the terms of the warranty. Because these are oral representations that purport to vary the terms of the written warranty booklet, the parol evidence rule would preclude their admission. (Code Civ. Proc., § 1856; *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263; *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1385; cf. *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 379.) The allegations therefore fail to state a claim.

B. ***Implied Warranty of Merchantability***

The warranty booklet attached to the complaint states: "ANY IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE SHALL BE LIMITED TO THE DURATION OF THIS WRITTEN WARRANTY." This is both consistent with and more generous than California statutory law. Under Civil Code section 1792, every consumer good sold in California is covered by an implied warranty that the goods are "merchantable." That warranty is, however, of limited duration; "[t]he duration of the implied warranty of merchantability . . . shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer." (Civ. Code, § 1791.1, subd. (c); see *Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212, 231.)[6]

Because the warranty of merchantability implied as a matter of law in California is limited to one year after purchase, plaintiffs' claim of recovery under a theory of implied warranty of merchantability must derive from the contractual language of the warranty

[6] California Uniform Commercial Code section 2314 also imposes a warranty of merchantability, but it does not contain a time limit. In the absence of any indication in the statute that it is intended to supersede or extend Civil Code section 1791.1, we assume that Uniform Commercial Code section 2314 does not extend the implied warranty with respect to the durability of a product beyond the one year maximum contained in Civil Code section 1791.1.

booklet. Plaintiffs argue that the language in the booklet declaring that implied warranties are "limited to the duration of this written warranty" means that the implied warranty on all parts of the vehicle extends as long as the longest express warranty, which is eight years. We find no support for the contention in either the language of the booklet or the rationale behind implied warranties of merchantability.

"The interpretation of a contract 'must be fair and reasonable, not leading to absurd conclusions.' " (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 842.) A "general rule of contract interpretation [is] that '[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' [Citation.] The rule's effect, among other things, is to disfavor constructions of contractual provisions that would render other provisions surplusage." (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503.) The warranty booklet describes in detail at least four different express warranties with different purposes and terms. The longest express warranty that covers the ignition coils is 36 months or 50,000 miles. The express warranties that have a greater duration cover a narrower range of the car's mechanical systems. Plaintiffs' argument would render this careful delineation of the terms of the various express warranties mere surplusage by using the implied warranty of merchantability to extend all warranties to the duration of the longest among them. In effect, it would render virtually all the terms in the warranty booklet moot by extending the general "new vehicle" warranty to eight years. This is plainly contrary to the intent of the booklet's drafters and, given the detail in the booklet, an absurd interpretation. It is clear the statement in the warranty booklet limiting the implied warranty to the duration of the express warranties was not intended to be interpreted in this manner.

Further, there is nothing in the nature of an implied warranty of merchantability that justifies such an extension. The implied warranty of merchantability applies primarily to the initial condition of a product, guaranteeing that it performs in a manner appropriate for the ordinary purposes for which such goods are used. (Civ. Code, § 1791.1, subd. (a)(2).) As suggested by the limitation of the warranty to a single year in

section 1791.1, the implied warranty of merchantability is not intended to guarantee extended durability. On the contrary, the implied warranty of merchantability provides only for a minimum level of quality. (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1296.) "[I]n the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation." (*Ibid.*; see, e.g., *Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 22, 27 [implied warranty violated when car malfunctioned in several ways within first 4,000 miles of use]; *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 405 [electrical system failure from time of purchase].) Plaintiffs' car operated for four years without apparent problem, easily satisfying any implied warranty that might attach as a matter of law. An implied warranty guaranteeing that the car would be free of all defects for a period extending up to eight years after purchase is wholly inconsistent with the minimal level of quality guaranteed by the implied warranty of merchantability.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, J.

We concur:

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Marchiano, P.J.

_____
Graham, J.*

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.